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No. 96-779

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONER

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May 30, 1997

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QUESTIONS PRESENTED

The Arkansas Educational Television Commission ("AETC") holds licenses from the Federal Communications Commission ("FCC") for the five noncommercial, educational ("public") television stations that comprise the Arkansas Educational Television Network ("AETN").

1. Is a debate between selected candidates chosen by a state-owned public broadcaster's professional editors, based on their informed judgment about newsworthiness, a nonpublic forum from which the editors may exclude a perennial candidate in whom the public has shown no interest?

2. Does the First Amendment protect the editorial judgments of a state public television network's professional editors who, free from political interference and following viewpoint-neutral policies, select the participating candidates to make the debate most useful and interesting to the viewers?

PARTIES TO THE PROCEEDING

In the Court of Appeals, the following were parties:

Appellant: Ralph P. Forbes

Appellees:
Arkansas Educational Television Commission
Arkansas Educational Television Network Foundation*
Dr. Caroline Whitson
Victor Fleming
Diane Blair
James Ross
Jerry Mcintosh
Lillian Springer
Lavenia Craig
Robert Doubleday
Susan J. Howarth
Amy L. Oliver Barnes

* The Arkansas Educational Television Network Foundation has no parent or nonwholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (App. 1a) is reported at 93 F.3d 497 (8th Cir. 1996). The United States District Court for the Western District of Arkansas did not render an opinion after the jury verdict in this case.

JURISDICTION

The court below issued its opinion on August 21, 1996, and Petitioner filed a timely Petition for Certiorari on November 19, 1996, which was granted on March 17, 1997. 117 S. Ct. 1243 (1997). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the district court was invoked under the First Amendment to the United States Constitution and 28 U.S.C. § 1331 (general federal question jurisdiction).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The constitutional and statutory provisions involved are reproduced in the Appendix to the Petition. They are: sections of the Arkansas Code Annotated, ARK. CODE ANN. §§ 6-3-101 to 6-3-113, 25-16-804 (App. 47a, 56a); the First Amendment to the United States Constitution (App. 58a); the Communications Act of 1934, as amended, Sections 3(h), 309(a), 312(a)(7), 315(a), and 402(a) (codified at 47 U.S.C. §§ 153(h), 309(a), 312(a)(7), 315(a), and 402(a) (1996)) (App. 58a); and the rules of the Federal Communications Commission, 47 C.F.R. §§ 73.1941, 73.1944 (App. 61a).

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner Arkansas Educational Television Network ("AETN" or the "Network") operates a network of five noncommercial educational ("public") television stations. Its Executive Director and other employees must regularly exercise their editorial judgment as journalists to decide what programming should be carried on the Network. Often that programming is about issues of local public interest. The programming may be about subjects or at a level of depth that commercial broadcasters do not usually offer. Indeed, the very premise of public broadcasting is to make such programming available. Although AETN is an agency of the State of Arkansas, there are legal and structural safeguards designed to ensure that the professional staff makes those editorial judgments free of interference from the state.

This case raises the question whether the First Amendment forbids AETN from exercising journalistic judgment. The particular facts of this case involve a debate among candidates for the House of Representatives, but the case implicates all of AETN's public interest programming. *See Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 652 (1981) (court should consider the disorder that would result from granting any speaker access, not just the disorder caused by the petitioning speaker). The fundamental issue is whether a member of the public, or the judiciary, may supplant the editorial judgment of AETN's professional staff about particular AETN programming.

B. Procedural History

AETN planned to broadcast a debate among selected congressional candidates to be held on October 22, 1992. After assessing the public's interest in each of the candidates, AETN's Executive Director Susan Howarth concluded that petitioner Ralph P. Forbes was not newsworthy enough to be invited to the debate. She determined that Mr. Forbes' candidacy had generated little or no public support, and therefore she concluded that AETN's viewing audience would be better served if the time available for the debate were devoted to candidates in whom the public was interested. She notified Mr. Forbes that he would not be invited to participate.

On October 19, 1992, three days before the debate, Mr. Forbes sued the Arkansas Educational Television Commission ("AETC"), its members, its Executive Director, certain AETN staff (collectively, the "AETN Defendants") and others in the United States District Court for the Western District of Arkansas. (J.A. 14) He alleged that, because he was qualified for the ballot as an independent candidate, he had a right to be included in the debate. Mr. Forbes alleged that AETN's decision not to invite him violated the Civil Rights Act, 42 U.S.C. §§ 1981 *et seq.*, and his First Amendment rights. He sought declaratory and injunctive relief and damages.

Mr. Forbes' motion for a preliminary injunction to be included in the debate was denied by the District Court on October 20, 1992. On October 21, 1992 and October 22, 1992, respectively, the Chief Judge and a panel of the Eighth Circuit denied Mr. Forbes' request for an injunction pending appeal.

(App. 45a, 43a)[1/] The court based its decision in part on *DeYoung v. Patten*, 898 F.2d 628, 632-33 (8th Cir. 1990), which held that Iowa's state-owned public television network is not a public forum for First Amendment purposes, and that candidates do not have a First Amendment right to appear in political debates on a state-owned public television station. (App. 44a, 46a) The debate was broadcast without Mr. Forbes' participation on October 22, 1992.

One week after the election, the AETN Defendants filed a motion to dismiss the complaint pursuant to FED. R. CIV. P. 12(b)(6). The District Court granted the motion and dismissed the complaint on December 16, 1992.

Mr. Forbes appealed, and on April 28, 1994, the Eighth Circuit, *en banc*, affirmed in part and reversed in part. *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423 (8th Cir.) (*en banc*) ("*Forbes I*") (App. 25a), *cert. denied*, 513 U.S. 995 (1994) (petition of AETN), 115 S. Ct. 1962 (1995) (petition of Mr. Forbes). The Eighth Circuit held that "Forbes alleged a First Amendment violation well enough to survive a motion to dismiss" (App. 32a), overruling the panel decision in *DeYoung v. Patten*. The court left open whether AETN's debate was a limited public forum or a nonpublic forum. *Forbes I* (App. 35a).

Trial was held on Mr. Forbes' First Amendment claim from June 5 to 7, 1995. The District Court instructed the jury that the debate was a nonpublic forum as a matter of law. On

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1/ "App." refers to the appendix to the Petition for Certiorari; "J.A." refers to the Joint Appendix; "Tr." refers to the transcript of the trial held June 5-7, 1995; "DX" refers to defendants' trial exhibits.

June 7, 1995, the jury returned a special verdict in favor of the AETN Defendants, finding that (1) AETN's decision not to invite Mr. Forbes was not influenced in any way by political pressure, and (2) the decision was not made because of AETN's objections or opposition to Mr. Forbes' views. (App. 22a-23a) The District Court entered judgment in favor of the AETN Defendants on June 7, 1995. (App. 21a)

Mr. Forbes appealed, and on August 21, 1996, a panel of the Eighth Circuit reversed. *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996) ("*Forbes II*"). (App. 1a) The Eighth Circuit held that the debate was a limited public forum because the debate "was staged in order for the candidates to express their views on campaign issues" (App. 14a-15a), and because "AETN, by staging the debate, opened its facilities to a particular group — candidates running for the Third District Congressional seat." *Id.* The Eighth Circuit also held that AETN's reason for excluding Mr. Forbes — that Mr. Forbes was not a "viable" candidate, a term used by the court — was not legally sufficient as applied to a limited public forum. (App. 16a-17a) The Eighth Circuit declared:

> We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. . . . But . . . the people making this judgment were not ordinary journalists: they were employees of government. . . . A journalist employed by the government is still a government employee.

Id.

On November 19, 1996, the AETN Defendants filed with this Court a Petition for a Writ of Certiorari. The Petition was granted on March 17, 1997.

C. Statement of the Facts

1. The Structure of AETC and AETN

AETC operates the Network, five interconnected noncommercial educational television stations licensed to AETC by the Federal Communications Commission ("FCC"). (Tr. 183 (S. Howarth), J.A. 108) Although AETC is an agency of the State of Arkansas (ARK. CODE ANN. § 6-3-101 (Michie 1994) (App. 47a)), there are statutes designed to protect programming decisions from political pressure from the state. The eight members of AETC are appointed by the Governor with the advice and consent of the state Senate for terms of eight (8) years (eligible for reappointment), and, once appointed, they may be removed only for good cause. *Id.* §§ 6-3-102(a)(1), 6-3-102(b)(1), 25-16-804(b)(1) (App. 47a, 48a, 56a). Except for educators in the state's public schools or institutions of higher learning, the members may not hold any other state or federal office, nor hold employment paid in whole or part by funds derived from tax sources. *Id.* § 6-3-102(a)(3) (App. 47a). The members of AETC appoint the Executive Director of AETC and AETN. *Id.* § 6-3-104 (App. 49a). The Executive Director is Susan Howarth. (Tr. 184 (S. Howarth), J.A. 108)

In addition to the statutory protections, AETC has adopted structural rules to ensure that programming decisions are based on professional editorial judgment free of political pressure from the state. In June 1988, AETC adopted the *Programming Policy Statement for AETN*. (Tr. 187, 194 (S. Howarth), J.A. 110, 115; DX 4, Tr. 179, 186, App. 96a) In that policy, AETC delegates to its Executive Director the authority to make programming decisions for the Network. (DX 4 § 1, Tr. 179, 186, App. 96a) In effect and practice, the *Programming Policy Statement* makes the Executive Director the "editor-in-chief"

of the Network. (*Id.*; Tr. 184 (S. Howarth), J.A. 108) Furthermore, the *Programming Policy Statement* authorizes the Executive Director to "delegate the exercise of this authority to professional staff based on informed programming discretion." (DX 4 at 1, Tr. 179, 186, App. 96a)

The *Programming Policy Statement* emphasizes the importance of the educational and other valuable programming that AETN provides:

> AETN furthers the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens/voters to make informed judgments about the issues of our time.
>
> * * * *
>
> Locally-produced programs relevant and responsive to Arkansas needs, problems, issues, and concerns are a very important part of a comprehensive broadcast schedule tailored to the interests of the people of this state.

(DX 4 §§ 10, 14, Tr. 179, 186, App. 100a, 101a) To accomplish those goals free of political pressure, the *Programming Policy Statement* also describes how the independent structure of AETN insulates the editorial decisions of AETN's professional journalists and programmers:

> AETN maintains public trust in its editorial integrity by shielding the programming process from improper political pressure or influence from program funders or other sources.

> AETN bases its public service programming on its value in the marketplace of ideas; not in financial considerations or commercial pressures.

(DX 4 § 6, Tr. 179, 186, App. 98a-99a)

In addition to the *Programming Policy Statement*, AETC also follows the *Statement of Principles of Editorial Integrity in Public Broadcasting*. (App. 64a; Tr. 194 (S. Howarth), J.A. 115) Those *Principles of Editorial Integrity* were developed at a nationwide conference of public broadcasters. The conference "was convened so that public broadcasting station managers and representatives of state licensee boards and commissions could explore the First Amendment position of public broadcasting licensees in the light of past legal decisions and legislative actions." (DX 8 (*Principles of Editorial Integrity*) at 17, Tr. 179, 193, App. 87a) The conferees, including representatives of AETC, were concerned about constitutional issues that might arise when state-owned broadcasting stations exercise editorial judgment. Consequently, they drafted the *Principles of Editorial Integrity* to "help to guarantee public broadcasting's editorial integrity in the future." (*Id.*) Editorial integrity in public broadcast programming is defined as "the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." (*Id.* at 3, App. 69a)

To insulate public broadcasters' programming from political pressure, the *Principles of Editorial Integrity* declares:

> The process of developing programs . . . must be managed by the professional staff according to generally accepted broadcasting industry standards, so that the programming service is free from pressure

> from political or financial supporters. The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs; not on funding considerations.

(*Id.* at 14, App. 82a) Pursuant to the *Principles of Editorial Integrity*, AETC makes all editorial decisions independent of the state. The journalistic process is deliberately protected from the political and administrative processes of the state.

2. AETN's Decision To Produce Debates for the 1992 Elections

In fulfillment of AETN's mission to provide valuable programming to the people of Arkansas about current issues of local interest, the Network began planning to produce debates for the 1992 federal elections. From the outset, the planning for the debates was done by AETN's professional staff with assistance from respected outside journalists. Carole Adornetto, Production Director at AETN, instructed Amy Oliver, Production Manager at AETN, to work with Bill Simmons, Chief of the Associated Press (the "AP") in Little Rock. (Tr. 195 (S. Howarth), J.A. 115; Tr. 292 (A. Oliver), J.A. 139-140; DX 15, Tr. 179, 292) Mr. Simmons, a respected journalist, was a consultant to AETN. AETN worked with Mr. Simmons because he "brought so much credibility" and because "he brought a lot to the process because of his — his background and his experience." (Tr. 195-96 (S. Howarth), J.A. 116)

AETN planned one debate for the senatorial race in Arkansas and one debate for each of the four congressional races in Arkansas. Each debate was to last one hour, which meant that, after introductory and closing material, there would

be only about 53 minutes available for the actual discussion by, and questioning of, the candidates. (Tr. 200 (S. Howarth), J.A. 119) AETN designed the debates to serve its viewers by providing a detailed discussion of the issues that were of greatest interest and importance to them. (Tr. 198-201, 207-08 (S. Howarth), J.A. 117-19, 123-24) The addition of a third-party candidate in whom the public had shown little interest would significantly dilute the time available for discussion of issues by the candidates in whom the viewing audience was interested. (Tr. 201 (S. Howarth), J.A. 119)

3. The Forbes Campaign

Respondent Forbes decided to run as an independent candidate for the United States House of Representatives from Arkansas' Third Congressional District in the 1992 elections. *See* Deposition of Ralph P. Forbes, dated April 13, 1995 ("Forbes Dep."), at 16-17.[2/] Under Arkansas' lenient rules, Mr. Forbes needed the signatures of only 2,000 qualified electors for his name to appear on the ballot. ARK. CODE ANN. §§ 7-7-101, 7-7-103(c)(1); Forbes Dep. 17-18. Even so, Mr. Forbes had great difficulty obtaining enough signatures to be certified. He had approximately 50 volunteers who worked "very part-time" helping him gather the required signatures. (Forbes Dep. 43) Most of his volunteers "weren't that productive." (*Id.*) Consequently, Mr. Forbes "realized it's more productive . . . to just get [the signatures] [himself] rather than try to . . . organize people to help [him]." (*Id.*) So, Mr. Forbes went out seeking signatures many times from dawn until

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2/ Mr. Forbes' deposition is found at tab 7 to Defendants' May 15, 1995 *Memorandum of Law in Support of Defendants' Motion for Summary Judgment*, filed in the District Court on May 16, 1995.

dusk, and he found it was not easy to get signatures. (*Id.* at 17) After two unsuccessful attempts, Mr. Forbes finally obtained enough signatures to be certified in August 1992. (*Id.* at 17, 43)

Mr. Forbes had a history of unsuccessful campaigns for public office that had generated little or no public interest. In 1985, Mr. Forbes ran for the school board in Pulaski County, Arkansas, but he "didn't have hardly any votes." (Tr. 144 (R. Forbes), J.A. 89; Forbes Dep. 13) In 1986, he ran in the Republican primary election for Lt. Governor of Arkansas, but lost. (Tr. 144 (R. Forbes), J.A. 89-90; Forbes Dep. 14) In 1986, he ran for the United States Senate, but he received only 52 votes out of 695,487 votes cast, or 0.01%. (DX 17 at 2, Tr. 179, 300; Tr. 300 (A. Oliver), J.A. 145) He received a plurality in the May 1990 Republican primary for Lt. Governor, a three way race, but then lost in the June 1990 Republican primary run-off election for Lt. Governor. (Tr. 146 (R. Forbes), J.A. 91; Forbes Dep. 15) In that election, he received only 4,431 votes out of the 31,980 votes cast, or 13.86%. (DX 18 at 41, Tr. 179, 300; Tr. 300-01 (A. Oliver), J.A. 145) In fact, in the 1990 Republican primary run-off election, Mr. Forbes did not win a single one of Arkansas' 75 counties. (DX 18 at 42, Tr. 179, 300; Tr. 301 (A. Oliver), J.A. 145-46; Forbes Dep. 16)

Mr. Forbes' 1992 campaign generated no discernable interest among the people of the Third District. Mr. Forbes himself described his campaign organization as "bedlam." (Tr. 146-47 (R. Forbes), J.A. 91; Forbes Dep. 42) "A lot of people that had volunteered just weren't there in reality. And it was like some of my other campaigns, it boiled down to a one or two man campaign towards the end." (Forbes Dep. 44-45; Tr. 147 (R. Forbes), J.A. 91) Mr. Forbes had no paid campaign staff. (Forbes Dep. 50) Other than his family, he had no volunteer staff who worked full-time or near full-time. (*Id.*)

There were "some or a few" part-time workers who put a significant effort into his campaign, but not a "substantial" number. (*Id.*)

Mr. Forbes used his house as his campaign headquarters. (Tr. 147 (R. Forbes), J.A. 91; Forbes Dep. 45) He testified that "wherever [he] was was the headquarters." *Id.*

Mr. Forbes raised relatively little money for his 1992 campaign. (Tr. 148 (R. Forbes), J.A. 91-92; Forbes Dep. 45) He raised less than $10,000, which he admitted "wasn't very much by politician standards." (Tr. 148 (R. Forbes), J.A. 92; Forbes Dep. 45; DX 21, Tr. 179, 302) In contrast, Mr. Forbes' opponents, Tim Hutchinson and John VanWinkle, raised approximately $371,000 and $431,000, respectively. (DX 19, Tr. 179, 302; DX 20, Tr. 179, 301; Tr. 301-02 (A. Oliver), J.A. 146) Mr. Forbes testified that, although he tried to raise more money, he was not successful because "[m]any people weren't aware that [he] was running." (Forbes Dep. 50)

Mr. Forbes testified that he was not well known because he did not buy enough advertisements. (Tr. 148 (R. Forbes), J.A. 92; Forbes Dep. 46-47) Mr. Forbes testified that he did not get nearly the coverage he needed in order to attract enough votes to win. (Tr. 148-49 (R. Forbes), J.A. 92-93; Forbes Dep. 49) By way of analogy, Mr. Forbes stated that he "wasn't even a flea scratching an elephant." (Forbes Dep. 49; Tr. 150 (R. Forbes), J.A. 93)

Mr. Forbes' campaign appearances generated no appreciable public interest. He did not remember *ever* speaking to any large groups during his campaign. (Tr. 155 (R. Forbes), J.A. 97; Forbes Dep. 55) He never held rallies. (Tr. 155 (R. Forbes), J.A. 96; Forbes Dep. 54) Indeed, he received only one or two invitations to speak at meetings, which he declined.

(Forbes Dep. 51-52; Tr. 172-73 (R. Forbes), J.A. 107) He testified:

> We kept trying to find out where — for whatever reason, I don't know the reason, but the people that were inviting my two opponents [to speak] were not inviting me. I have no way of knowing why. It's just a fact, and we kept trying to find out where they were going but we always — it was too late to — to meet them or become part of that.

(Tr. 173 (R. Forbes), J.A. 107; *see* Forbes Dep. 52)

None of the media felt his campaign was of sufficient interest to cover. Mr. Forbes described the press coverage of his campaign as "zilch." (Tr. 154 (R. Forbes), J.A. 96; Forbes Dep. 56) When asked whether any reporters traveled with him, Mr. Forbes responded, "Absolutely not." (Tr. 153 (R. Forbes), J.A. 95; Forbes Dep. 53) He testified:

> I was told by many people that there was a general consensus that we were non-persons. We didn't exist. Our campaign didn't exist and it was generally agreed by everyone that no matter what I did, if I ran around in a flaming war bonnet naked, jumping off towers it would be not newsworthy, and the odd part about one thing I do recall I think it's 'Asahi' or however they pronounce it. It's the largest Japanese news media in the country, meaning Japan, kept calling me. They wanted to come down and film my campaign. I had to keep telling them I'm sorry, there's nothing to film.

(Tr. 153 (R. Forbes), J.A. 95; Forbes Dep. 52) In contrast, the major party candidates were "getting statewide coverage." (Forbes Dep. 55-56)

Mr. Forbes testified that it would have taken a miracle to win the 1992 election. (Tr. 162 (R. Forbes), J.A. 100; Forbes Dep. 82) Ultimately, Mr. Forbes received only 2.5% of the vote in the 1992 election. (DX 22 at 49, Tr. 179, 302, J.A. 172; Tr. 303 (A. Oliver), J.A. 147)

4. Mr. Forbes' Request to Participate in the Debate

On June 17, 1992, Mr. Simmons of the AP sent invitations to each of the major candidates in the Senate and House races, inviting them to participate in the televised debates to be aired on AETN. For the debate concerning the Third Congressional District, invitations were sent to Mr. VanWinkle, the Democratic candidate, and Mr. Hutchinson, the Republican candidate. At the time the invitations were sent, they were the only qualified candidates running for this seat; Mr. Forbes did not qualify until two months later. (Forbes Dep. 17, 24-25) By letter dated August 24, 1992, Mr. Forbes requested that he be included in the debate. (DX 11, Tr. 179, 197, App. 105a)

AETN and Mr. Simmons considered whether to invite Mr. Forbes to participate in the debate. The feeling among both the professional staff at AETN and Mr. Simmons was that, with only 53 minutes for the actual debate, time was a precious commodity; if there were too many participants in each debate, there would not be enough time for each candidate to discuss the issues in-depth, in a meaningful manner. They felt that the debates would not be worthwhile if the candidates had time only to make short, superficial statements about important issues. Thus, they concluded that, to offer an informative debate that would serve the viewers best, the issues should be discussed in-depth by those candidates who were receiving serious support from the public. (Tr. 198-201, 207-08 (S. Howarth), J.A. 117-19, 123-24; Tr. 293 (A. Oliver), J.A. 140)

Ms. Howarth was also concerned that AETN might lose credibility among its viewing audience if the debate included a candidate whom the public did not take seriously. (Tr. 207-08 (S. Howarth), J.A. 123-24)

Ms. Oliver made a recommendation about whom to invite to the debate. She carefully conducted thorough research about Mr. Forbes' campaign to determine whether he was a candidate who was generating popular support. (Tr. 297-98 (A. Oliver), J.A. 142-43) Ms. Oliver used her professional journalistic judgment in making that evaluation. She consulted with Mr. Simmons, as well as other journalists, to get an assessment of how politicians and knowledgeable political observers in Arkansas viewed Mr. Forbes. (Tr. 294-95, 296, 297-98, 298-99 (A. Oliver), J.A. 141, 142, 143-44; Tr. 200, 202, 212-14 (S. Howarth), J.A. 118, 120, 127-28) Mr. Simmons' professional judgment was that Mr. Forbes had no popular support and that he should not be invited to participate in the 1992 debate. (DX 16, Tr. 179, 294)

Ms. Oliver considered that:

- Mr. Forbes raised a very small amount of money for his campaign. (Tr. 148 (R. Forbes), J.A. 92; DX 13, Tr. 179, 211; DX 14, Tr. 179, 213; DX 16, Tr. 179, 294)

- Mr. Forbes did not have any paid or volunteer campaign staff. (Forbes Dep. 50)

- Mr. Forbes did not have campaign headquarters, other than his house. (Tr. 147 (R. Forbes), J.A. 91; Tr. 199, 202, 213 (S. Howarth), J.A. 118, 120, 127; DX 13, Tr. 179, 211)

- Mr. Forbes had little popular support among the voters of the Third District, and AETN's viewing audience therefore had no appreciable interest in seeing him. (Tr. 198-99, 201 (S. Howarth), J.A. 117-18, 119; TR. 295, 299, 304 (A. Oliver), J.A. 141, 144, 147)

- Other professional political journalists did not consider Mr. Forbes to be a significant participant in the race for the House of Representatives. (Tr. 296 (A. Oliver), J.A. 142; DX 13, Tr. 179, 211; DX 14, Tr. 179, 213)

- Other professional journalists did not even plan to report Mr. Forbes' name in the election night results. (Tr. 199-200 (S. Howarth), J.A. 118; Tr. 298-99 (A. Oliver), J.A. 144; DX 13, Tr. 179, 211)

- Mr. Forbes was a perennial candidate who had received no appreciable support. In his best prior showing in the 1990 primary run-off for Lt. Governor, he did not win any of the 75 counties in Arkansas. (*See* Tr. 300-01, J.A. 145-46; DX 18 at 42, Tr. 179, 300; DX 13, Tr. 179, 211)

In summary, Ms. Oliver concluded that Mr. Forbes was not a "serious candidate," and that the viewing audience was not interested in seeing Mr. Forbes. (DX 13, Tr. 179, 211; DX 14, Tr. 179, 213; DX 16, Tr. 179, 294) Accordingly, Ms. Oliver recommended not inviting Mr. Forbes to participate in the debate.

Ms. Adornetto and Ms. Howarth, using their professional journalistic judgment, agreed. (*See* Tr. 298 (A. Oliver), J.A. 143-44) Ms. Howarth notified Mr. Forbes of her decision not

to invite him in a letter dated September 4, 1992. (*Id.*; DX 12, Tr. 179, 205, App. 103a)

The decision not to invite Mr. Forbes to participate in the debate was based on the professional editorial judgment of Ms. Howarth and her colleagues. The jury specifically found that the AETN Defendants did not exclude Mr. Forbes "because of objections or opposition to his views" (App. 23a), and that finding is amply supported by the record. (*E.g.*, Tr. 210 (S. Howarth), J.A. 125; Tr. 295-96, 345 (A. Oliver), J.A. 142, 154) The jury also found that the decision to exclude Mr. Forbes was not "influenced *in any way* by political pressure from anyone inside or outside of the Arkansas Educational Television Network." (App. 22a, emphasis added) That finding too is well supported by the record. (*E.g.*,Tr. 209-10 (S. Howarth), J.A. 124-25; Tr. 304 (A. Oliver), J.A. 147) The decision was a professional journalistic decision of the kind that journalists, like those at AETN and the AP, make routinely.

SUMMARY OF THE ARGUMENT

Every broadcasting station is licensed under the Communications Act on the premise that the licensee will at all times maintain editorial control of programming. The tradition and nature of broadcasting as an editorial enterprise support the premise that the licensee, when presenting a news program such as a debate, will control the subject matter, including the selection of guests. The evidence in this case proves that AETN did not intend to open the debate to all qualified candidates, but only to candidates judged by the network's editors to be newsworthy, and hence of interest to the audience. Consequently, the debate was a nonpublic forum, and AETN reasonably excluded Mr. Forbes because he was not newsworthy. The jury found that Mr. Forbes was not excluded because of his views.

Even if this Court were to hold that the debate was a limited public forum, the decision below is still erroneous. Arkansas has a compelling state interest to provide to its citizens the unique programming available on public television, including debates among candidates in whom the viewing audience is interested. Accomplishing that compelling interest requires that the broadcaster be allowed to make editorial judgments about programming, as this Court has recognized. In short, editorial freedom is essential to meet the compelling state interest. AETN's selection of the debate participants was narrowly tailored to that interest. It was made only after careful investigation by AETN's journalists. And their decision was limited to factors properly considered by an editor, and was not influenced by political pressure, bias against Mr. Forbes' viewpoint, or a desire to promote another candidate.

Alternatively, the First Amendment protects the exercise of editorial judgment by AETN's Executive Director. The jury found that AETN's decision not to invite Mr. Forbes was not influenced by political pressure. AETC's policies establish AETN as an institution of the free press. They create structural safeguards against application of political pressure to influence the editorial decisions of AETN's professional journalists. The safeguards are a state-level complement to the structural protections enacted by Congress for public broadcasting and analyzed in *FCC v. League of Women Voters*, 468 U.S. 364, 394 (1984) ("*League of Women Voters*"). Because AETN's Executive Director functions in an editorial role that is independent of, and inherently adversarial to, the state, the decisions of this Court support protecting her editorial decisions under the First Amendment.

ARGUMENT

This Court evaluates the public's First Amendment right of access to government property by analyzing the nature and character of the property. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800-01 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983). Under *Cornelius*, the government's intent is the starting point in forum analysis, because "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." 473 U.S. at 802. Analyzing intent is crucial, because the "State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)); *Perry Educ. Ass'n*, 460 U.S. at 46; *Cornelius*, 473 U.S. at 800. The "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). The state must have "substantial discretion" in determining how to allocate scarce resources to accomplish its mission. *Rosenberger v. Rector & Visitors of the University of Virginia*, 115 S. Ct. 2510, 2518 (1995).

The Court uses a forum analysis to determine into which of three categories the property at issue falls. The first category is the public forum. It is property "which by long tradition or by government fiat ha[s] been devoted to assembly and debate." *Perry Educ. Ass'n*, 460 U.S. at 45. In a public forum, the state's right to limit expressive activity is sharply circumscribed. *Id.* There is no dispute that the debate at issue here is not a traditional public forum.

The second category is the limited public forum. It is a forum "which the State has opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n*, 460 U.S. at 45. The state may confine the limited public forum to the limited and legitimate purposes for which it was created. *Rosenberger*, 115 S. Ct. at 2516. Within those confines, the state's restrictions must be narrowly drawn to effectuate a compelling state interest. *Perry Educ. Ass'n*, 460 U.S. at 46. The court below found that the debate was a limited public forum, and that the exclusion of Mr. Forbes was not narrowly tailored to effectuate a compelling state interest. (App. 14a, 17a)

The third category is the nonpublic forum. *Perry Educ. Ass'n*, 460 U.S. at 46. It is property that "is not by tradition or designation a forum for public communication." *Id.* In a nonpublic forum, the state may restrict access as long as the restrictions are reasonable and are not made to suppress the speaker's viewpoint. *Cornelius*, 473 U.S. at 800. In this case, the district court instructed the jury that the forum was a nonpublic forum, and the court of appeals reversed on that ground.

I. AETN'S DEBATE WAS A NONPUBLIC FORUM. ITS DECISION TO EXCLUDE MR. FORBES WAS REASONABLE AND NOT MADE TO SUPPRESS HIS VIEWPOINT.

AETN asserts that the debate and, indeed, all of AETN's program schedule, are nonpublic fora. This Court recognizes that "[n]ot every instrumentality used for communication . . . is a traditional public forum or a public forum by designation." *Cornelius*, 473 U.S. at 803. The fact that "[expressive] activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First

Amendment purposes." *Id.* at 805. Rather, whether a forum is a limited public forum turns on the state's intent to open the forum for public discourse:

> [T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with [the] expressive activity to discern the government's intent.

Id. at 802 (citations omitted). This Court emphasizes that it "will not find that a public forum has been created in the face of clear evidence of a contrary intent." *Id.* at 803. Nor will the Court "infer that the government intended to create a public forum when the nature of the property is inconsistent with the expressive activity." *Id.* Thus, the Court has repeatedly found that fora created for expressive activities were not limited public fora when the government did not intend one to be created. *See Perry Educ. Ass'n*, 460 U.S. at 46 (school's mail facilities not a public forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (advertising space on city buses not a public forum).[3/]

3/ *See also Barnard v. Chamberlain*, 897 F.2d 1059, 1065-66 (10th Cir. 1990) (state bar publication is nonpublic forum, and plaintiff has no right of access to publish there); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 381 (5th Cir. 1989) (same); *Avins v. Rutgers*, 385 F.2d 151, 153 (3d Cir. 1967) (refusal of state university law review editors to accept article for publication did not violate author's First Amendment rights), *cert. denied*, 390 U.S. 920 (1968).

The court of appeals held that the debate itself was the forum, relying on the statement in *Cornelius,* 473 U.S. at 801, that the forum is defined in terms of the access sought by the speaker. (App. 12a-13a) Yet AETN's obligation to maintain editorial control applies to all its programming:

> A basic premise of Commission policy is that a licensee is a "trustee" for the public, and that he must therefore assume the "primary duty and privilege to select the material to be broadcast to his audience. . . ." "The [Federal Communications] Commission has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee."

Cosmopolitan Broad. Corp. v. FCC, 581 F.2d 917, 921 (D.C. Cir. 1978) (citations omitted), *rev'g on other grounds Cosmopolitan Broad. Corp.*, 59 F.C.C.2d 558 (1976); *see also Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1040 (5th Cir. 1982) (the FCC "fulfilled its statutory obligations by promulgating regulations which view licensees as having the sole right and nondelegable responsibility to select the programs to be broadcast"), *cert. denied*, 460 U.S. 1023 (1983).

Under the Communications Act, 47 U.S.C. §§ 151 *et seq.*, and the rules and policies of the FCC, all AETN's programming must remain at all times under AETN's editorial control. The only exception is for "uses" by political candidates under the "equal opportunities" provision of the Communications Act, 47 U.S.C. § 315 (App. 59a-60a), and the "reasonable access" provision that applies to federal candidates, 47 U.S.C. § 312(a)(7) (App. 59a), discussed in greater detail *infra* at note 7 and accompanying text. Consequently, the

nonpublic forum nature of the Network's overall schedule dictates that each program also be a nonpublic forum.

To determine whether a forum is public or nonpublic, the Court considers "the nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius*, 473 U.S. at 802. The property here is a broadcast station, whose programming is not traditionally open to participation by the public. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973) ("*CBS v. DNC*"); *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) ("Petitioners are correct that the Court has never approved a *general* right of access to the media."). That is as true of public television stations licensed to state entities as it is of public stations licensed to non-state corporations or to commercial stations.[4/] The Court recognizes that the broadcast media pose unique physical limitations that necessarily restrict the broadcaster to one program or one speaker at a time. *CBS v. DNC*, 412 U.S. at 101.

4/ *See Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486, 488-89 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991); *Schneider v. Indian River Community College Found., Inc.*, 875 F.2d 1537, 1541 (11th Cir. 1989); *Muir*, 688 F.2d at 1040; *DeYoung v. Patten*, 898 F.2d 628, 630 (8th Cir. 1990), *overruled by Forbes I*; *see also League of Women Voters*, 468 U.S. at 394 ("Congress. . . imposed no special requirements to restrict state or local control over these [state-entity licensed] stations. . . .").

A. The Debate was a Nonpublic Forum.

The uncontradicted evidence shows that AETN did not intend to create a limited public forum. Rather, AETN intended to create a nonpublic forum for *selected* candidates who its professional staff concluded were newsworthy to the viewing audience. This Court has held that "[s]uch *selective* access, unsupported by evidence of a purposeful designation for public use, *does not create a public forum*." *Cornelius*, 473 U.S. at 805 (emphasis added). A public forum is not created by permitting "limited discourse" but requires opening the forum to "public discourse." *Id.* at 802.

The uncontradicted evidence shows that the debate was intended for *selected* participants and was not opened to public discourse. Ms. Howarth testified that "the debates were designed to benefit the viewers of AETN in the Third Congressional District." (J.A. 117) Her staff consulted Mr. Simmons, a respected journalist with the Associated Press, and together they researched whether Mr. Forbes' inclusion would be newsworthy to the viewers. They found that Mr. Forbes was a perennial candidate who garnered little or no public support in his past campaigns, that the public donated very little to his campaign, that he did not have a campaign headquarters, and that he did not have any paid or full-time volunteer staff. (J.A. 118, 141, 142-43, 143-44) Mr. Forbes' campaign generated so little public interest that he never spoke at any rallies or before large groups. (J.A. 96-97; Forbes Dep. 55) Indeed, he even declined the one or two invitations he received to speak at meetings. (J.A. 107; Forbes Dep. 51-52) The AP did not even plan to report Mr. Forbes' name in the election night results. (J.A. 118, 144) AETN's professional staff concluded among other things that Mr. Forbes had no practical chance of winning. (J.A. 118-19, 141-44)

Because Mr. Forbes did not have any "serious support among the constituents, the voters" (J.A. 119), AETN's professional staff made the judgment that the program would be of greater interest and service to viewers in the Third District if it included only the two candidates who had demonstrable public support, the major party candidates. Otherwise, the voters would have less opportunity during the limited time available to hear from the candidates in whom they were interested. (J.A. 117-19, 123-24, 140) Further, Ms. Howarth was concerned that AETN would lose credibility with its viewing audience — credibility that is essential to a news organization or a broadcaster — if it included a candidate whom the public did not take seriously. (J.A. 123-24) As Ms. Howarth testified:

> [I]f we included him in the debate and gave him equal status with the two other candidates and gave him an equal amount of time in the debate then that would have been breaching that trust with our viewers because it would be giving him a status that he had not earned through the support that he had from the voters.

(J.A. 123)

AETN's intent to create a nonpublic forum is further demonstrated by AETC's reposing editorial control in the Executive Director, Ms. Howarth. The *Programming Policy Statement* (App. 96a) designates the Executive Director as the "editor" who is delegated the responsibility for making programming decisions. She must make her decisions

> based on informed programming discretion founded upon the Commission's mission statement, determinations of Arkansas needs, problems, and

> interests, seasoned judgment, media research, mail/phone comments from viewers and the public, and consultation with television programming experts.

(App. 96a) The *Programming Policy Statement* instructs the Executive Director to maintain "editorial integrity." (App. 98a-99a)

AETN's intent is further demonstrated by one of the most important organic documents in this field, the *Principles of Editorial Integrity*. (App. 64a) It declares:

> Editorial integrity in public broadcasting programming means the *responsible application by professional practitioners of a free and independent decision-making process* which is ultimately accountable to the needs and interests of all citizens.
>
> * * * *
>
> The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs; not on funding considerations.

(App. 69a, 82a (emphasis added)) AETC's adoption of this policy evinces an unambiguous intent that its Executive Director function as an "editor" and control the content of its programming.

That AETN intended the debate to be for *selected* candidates chosen on the basis of newsworthiness[5/] — and therefore not to make it a public forum — is further demonstrated by the fact that Ms. Howarth planned to satisfy the FCC's requirements for an "exempt" debate. (App. 103a) Under Section 315 of the Communications Act, 47 U.S.C. § 315 (App. 59a-60a), a candidate has a right to demand "equal opportunities" unless the debate is designed to meet the requisites of "on-the-spot coverage of a bona-fide news event" under Section 315(a)(4) of the Communications Act.[6/] For a debate both sponsored and broadcast by the licensee, those requirements are:

5/ "Newsworthiness" as a standard for decision-making among journalists generally, and among broadcast editors specifically, was recognized in *CBS v. DNC*, 412 U.S. at 119 ("Obviously the licensee's evaluation is based on its own journalistic judgment of priorities and newsworthiness."). *See also Marcus v. Iowa Pub. Television*, 93 F.3d 1137, 1143-44 (8th Cir. 1996) (broadcaster and expert witness discussion of newsworthiness).

6/ The FCC's standards for exempt debates apply to privately and publicly owned licensees alike. *See Johnson v. FCC*, 829 F.2d 157, 160-63 (D.C. Cir. 1987) (third party candidate's request for access to debate on a commercial station held to be inconsistent with Congress' decision to promote coverage of political news and preserve First Amendment rights of broadcasters); *Jim Trinity*, Letter, 7 FCC Rcd 3199 (1992) (state university licensee); *Arthur R. Block*, Letter, 7 FCC Rcd 1784 (1992) (community licensee and state university licensee).

- The participants in the debate must be selected by the licensee in the exercise of its bona fide editorial judgment.

- The decisions regarding the debate cannot be made for the purpose of advancing any particular candidacy.

See generally Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976); *Henry Geller*, 95 F.C.C.2d 1236 (1983), *aff'd mem.*, *League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984). This debate met those requirements, *see* 47 C.F.R. § 73.1941(a)(4) (App. 61a-62a); *Political Primer 1984*, 100 F.C.C.2d 1476, 1502-03 (1984). In any event, Mr. Forbes chose not to exercise his right under FCC rules to challenge whether the debate was exempt. (J.A. 98-99)

The fact that the debate was exempt under Section 315 and the FCC's rules offers further proof that the debate must be a nonpublic forum. For a broadcaster to meet the requirements of a "bona fide news event," the broadcaster *must* exercise editorial judgment to decide whom to invite to participate, *see* 47 C.F.R. § 73.1941(a)(4) (App. 61a-62a). Further, the exemptions to Section 315(a) and the FCC's rules implementing them are carefully structured to preserve licensees' exercise of news judgment. *See generally Chisholm*, 538 F.2d 349; *Geller*, 95 F.C.C.2d 1236. Because Ms. Howarth from the start intended the debate to be exempt (App. 103a), there cannot be any question that AETN did not intend to create a public forum. Thus, there is "clear evidence of a contrary intent" which precludes finding the debate to be a public forum. *See Cornelius*, 473 U.S. at 803.

In addition, this Court holds that, "where the principal function of the property would be disrupted by the expressive

activity, the Court is particularly reluctant to hold that the government intended to designate a public forum." *Cornelius*, 473 U.S. at 804. *See also Greer v. Spock*, 424 U.S. 828 (1976) (military reservation); *Adderley v. Florida*, 385 U.S. 39 (1966) (jail house). In this case, the access Mr. Forbes seeks would disrupt the principal function of the expressive activity because it would significantly reduce the time available to the newsworthy candidates.

Further, the Court must consider not just the effect of granting access to Mr. Forbes but also the disruption that would occur if every other candidate sought access too. *See Heffron*, 452 U.S. at 652 ("The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON."); *Perry Educ. Ass'n*, 460 U.S. at 52 n.12. If every candidate had a constitutional right to appear in a debate on public television, then public broadcasters would be flooded with requests for access. Moreover, some third party and perennial candidates seek attention by using disruption as a tactic. In either case, the views of the candidates in whom the viewing audience was most interested would drown in the cacophony. The program would be of little if any value to the public, viewers would tune out, and public broadcasters would abandon the effort. The primary goal of public broadcasting and, indeed, of the First Amendment — to encourage speech — would be disrupted.

The disruption would not be limited to programs called "debates." For example, it might include programs dealing with education, the environment, or military policy. Candidates are already seeking to apply the decision below to programs structured as bona fide news interviews under Section 315(a)(2) of the Communications Act, 47 U.S.C. § 315(a)(2) (App. 59a-60a). *Marcus*, 97 F.3d 1137. Indeed, it is unlikely that such a right of access could be limited to campaign debates. Public

broadcasters offer a wide variety of important programming about a panoply of local and national controversies. People and advocacy groups with a special interest would likely seek to enforce their access to programming about important topics. Broadcasters' editorial control would be unavailing and, with that, their capacity to present an editorial product would be hobbled to the point of destruction. "[The] concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action." *CBS v. DNC*, 412 U.S. at 121. In short, much of the valuable programming offered by AETN and other public broadcasters would be undermined if the programs were held to be limited public fora.

B. The Eighth Circuit's Forum Analysis Departs from *Cornelius* and Fails to Meet the Standards of *Bose*.

The court of appeals held below that AETN's debate was a limited public forum. (App. 14a) In this First Amendment case involving "constitutional facts," *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n.27 (1984), the court was required to make "an independent examination of the *whole* record." *Id.* at 499 (citations and internal quotations omitted, emphasis added). The court below erred in that analysis. The court rather reached its conclusion by omitting any analysis of most of the evidence about the selection process used by AETN and of the AETC policy framework in which those journalistic selections were made — all "constitutional facts."

Instead, the court of appeals declared that AETN staged the debate "in order for the candidates to express their views on campaign issues" (App. 15a), and that

> [t]he debate was surely a place opened by the government for a limited class of speakers. What was that class? Was it all candidates for Congress legally qualified to appear on the ballot, or was it simply the Republican and Democratic candidates? . . . . Surely government cannot, simply by its own *ipse dixit*, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation.

Id. In effect, the court of appeals created a nonrebuttable presumption that any candidate who qualifies for the ballot must be invited, regardless of newsworthiness.

The court of appeals set up a false choice by asking whether the "limited class of speakers" consists of all legally qualified candidates or just the Republican and Democratic candidates. The answer is, "neither." Instead, the overwhelming, uncontradicted evidence is that AETN invited to the debates those candidates whom its professional staff judged in good faith to be newsworthy. That was the test. The decision was not based on party affiliation. (J.A. 139)

It is noteworthy that, in the decision below, the court of appeals made no mention of Ms. Howarth's and Ms. Oliver's testimony about their intent to invite only newsworthy candidates. Similarly, the court of appeals completely omitted discussing the significance of the debate's "bona fide news event" exemption from the FCC's equal opportunity rules. (*See* App. 103a) As shown above, an exempt debate sponsored by a broadcaster by definition cannot be a public forum, because the FCC's rules *require* the licensee to exercise editorial judgments, including the selection of the participants. Thus, the court of appeals ignored crucial evidence showing AETN's

intent to select the participants rather than to open the debate to all comers.

That is not the only salient evidence not mentioned by the court of appeals. For example, the court hypothesized that "[t]he debate was surely a place opened by the government for a limited class of speakers." (App. 15a) Yet the uncontradicted testimony of Ms. Howarth was that "the debates were designed to benefit the viewers of AETN in the Third Congressional District, that we were putting the debate on for *their* benefit." (J.A. 117 (emphasis added)) The same is apparent from Ms. Oliver's testimony: "I didn't think it would be of *service to our viewers* to include Mr. Forbes on the debate." (J.A. 143 (emphasis added)) The distinction is important, for it shows that AETN did not, under *Cornelius*, intend to benefit any class of *candidates*. It is important too under the FCC's political broadcasting rules, because a debate would lose its exemption from equal opportunities under Section 315(a)(4) if it were held to advance any candidacy, rather than to serve the audience by covering the news in the licensee's bona fide judgment. *Political Primer 1984*, 100 F.C.C.2d at 1502-03.

The court of appeals' error is rooted in its redefinition of the conclusion reached by AETN's professional staff. AETN's journalists concluded that Mr. Forbes was not sufficiently newsworthy. (J.A. 118, 120, 142, 143-44) The court, however, focused in isolation on the fact that AETN considered Mr. Forbes unlikely to win the election (App. 16a-17a), and declared that estimates of "political viability" should be left "to the professional judgment of nongovernmental journalists." (App. 17a) Although Mr. Forbes' admittedly remote chances of winning were one factor, in fact AETN's staff considered far more, including (i) the public's lack of interest in his campaign, (ii) the lack of coverage by other journalists and media

organizations, (iii) his lack of any perceptible campaign organization, (iv) his weak showings in his many prior campaigns, (v) his failure to raise significant funds, and (vi) his dearth of speaking engagements or rallies. (J.A. 91-92, 96-97, 107, 118-19, 120, 126-28, 141, 142, 143-44)

The reasoning of the court of appeals does not comport with this Court's admonition in *Cornelius* that "selective access, unsupported by evidence of purposeful designation for public use, does not create a public forum." 473 U.S. at 805. AETN's intent in creating the forum, the broadcaster's established duty to control all its programming, the tradition and role of exempt debates in broadcasting, and the statutory and regulatory context in which exempt debates occur all lead directly to the conclusion that this program was not intended to benefit the candidates, was opened only to selected candidates who were newsworthy, and was a nonpublic forum.

C. AETN's Decision Not To Invite Mr. Forbes Was Reasonable and Was Not Based on His Viewpoint.

For a nonpublic forum like this one, the state may restrict access as long as the restrictions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46. This Court explained:

> The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated.

Cornelius, 473 U.S. at 808 (emphasis in original). Given the public's lack of interest in Mr. Forbes, AETN's not inviting him was reasonable. (AETN's judgments in this instance also were narrowly tailored to serve a compelling interest, although the state's exclusion of a speaker from a *nonpublic* forum need not be so tailored. *Id.* at 800.)

The viewpoint prong of the test was resolved by the jury. Last Term, the Court expressed concern about discrimination based on viewpoint. *Rosenberger*, 115 S. Ct. at 2516-19. But this is not such a case. The jury found that AETN did not "exclude[] Mr. Forbes from the political debate because of objections or opposition to his views." (App. 23a) That finding is amply supported by the record. The policies and practices followed by AETN — the *Programming Policy Statement* (App. 96a) and the *Principles of Editorial Integrity* (App. 64a) — are viewpoint-neutral on their face. And there is overwhelming evidence that the decision not to invite Mr. Forbes was based on a judgment that he was not newsworthy, rather than on any evaluation, or dislike, of his viewpoint. (J.A. 125, 139, 141-42, 154)

The decision not to invite Mr. Forbes was also reasonable. AETN's *Programming Policy Statement* requires attention to maintaining editorial integrity. (App. 98a-99a) Ms. Howarth had ample data from which to conclude that her audience in the Third District had essentially no interest in hearing Mr. Forbes state his views. (J.A. 117-21) Moreover, she judged that any attempt by AETN to enhance Mr. Forbes' legitimacy (by putting him on the same program with candidates whose public support was tangible) would be perceived as a breach of trust by the audience. (J.A. 123) *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . . .").

Further, the "First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Cornelius*, 473 U.S. at 809. "Rarely will a nonpublic forum provide the only means of contact with a particular audience." *Id.* The "First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron*, 452 U.S. at 647. Moreover, Mr. Forbes had an alternate channel to be heard — a legally qualified federal candidate may request, and the broadcaster must grant, program time under "reasonable access" requirements. 47 U.S.C. § 312(a)(7) (App. 59a-60a). Mr. Forbes did not take advantage of that opportunity, but asked only to participate in this debate. If he had requested reasonable access, AETN would have granted it.[7/] (J.A. 120-23) Had he simply wanted to broadcast his views, "reasonable access" afforded the vehicle. Mr. Forbes' disinterest in appearing free, but by himself, under "reasonable access," shows that his goal was to gain legitimacy from being seen on the same stage with candidates who had already gained significant public support. He wanted not to level the playing field, but to tilt it to his advantage.

In sum, AETN's decision to exclude Mr. Forbes was reasonable, was not viewpoint-based, and did not preclude him from using alternative channels available to him.

7/ *See Political Primer 1984*, 100 F.C.C.2d at 1479, 1523; 47 C.F.R. § 73.1944 (App. 63a). On a noncommercial network such as AETN, no charge can be made for time granted under reasonable access, and facilities may be charged at cost. 47 C.F.R. § 73.621(a), (c), (e).

II. EVEN IF THE DEBATE WERE A LIMITED PUBLIC FORUM, AETN'S JOURNALISTIC DECISIONS WERE NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST.

The court below found that the debate was a limited public forum. (App. 14a) That decision was erroneous, for the reasons set forth above and in Section III, below. However, even if the First Amendment did not protect Ms. Howarth's exercise of editorial judgment, and even if the debate were held to be a limited public forum, the court of appeals erred when it found that AETN's actions did not meet the criteria applicable to a limited public forum — that the exclusion must be narrowly tailored to serve a compelling state interest. *Perry Educ. Ass'n*, 460 U.S. at 45-46.

Arkansas' interest here is compelling. The Arkansas legislature created AETC "for the purpose of making the benefits of educational television available to and promoting its use by inhabitants of Arkansas." (ARK. CODE ANN. § 6-3-105 (App. 50a)) The state has a compelling interest to provide the special educational, cultural and informational programming on public television that is not otherwise available to the public. That compelling interest includes airing programming judged by the professional staff to be newsworthy. *See Marcus v. Iowa Pub. Television*, 24 Med. L. Rptr. 2531, 2533 (S.D. Iowa 1996);[8] 97 F.3d at 1143-44. To accomplish that goal, AETN's

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8/ The District Court declared:

> It is profoundly important that the defendant network and it news editors be allowed to exercise independent journalistic and editorial judgments based on newsworthiness. If the defendant network may not exercise editorial discretion in determining the content of its programs, the network would be fundamentally bland and of little value to the public it serves. So defendants proved they were serving a compelling state interest in excluding the plaintiff candidates from the *Iowa Press* programs.

24 Med. L. Rptr. at 2533 (citations omitted).

editors must be permitted to function as journalists. *See League of Women Voters*, 468 U.S. at 378 ("[W]e must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters.") As this Court has said, "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material." *CBS v. DNC*, 412 U.S. at 124. The *Principles of Editorial Integrity* echoes the importance of the editorial function: "Editorial integrity in public broadcasting programming means the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." (App. 69a) Thus, other than in the decision below, the courts of appeals have repeatedly held that a state public broadcaster has a compelling interest to allow its employees to exercise editorial judgment.[9]

Arkansas has a second compelling state interest — to operate the Network in conformity with the FCC's licensing requirements. The FCC demands that a licensee maintain

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9/ *See Marcus*, 97 F.3d at 1144; *Muir*, 688 F.2d at 1044; *Schneider*, 875 F.2d at 1541.

control over all of its programming.[10/] The access Mr. Forbes seeks would cause Arkansas to give up that control, placing its qualifications as a licensee in jeopardy.

AETN's selection of candidates for the debate was narrowly tailored to meet those compelling state interests. This Court explains that the state may confine a limited public forum "to the limited and legitimate purposes for which it was created," including "reserving it for certain groups or for the discussion of certain topics." *Rosenberger*, 115 S. Ct. at 2516-17. The "constitutional right of access would in any event extend only to other entities of similar character." *Perry Educ. Ass'n*, 460 U.S. at 48. Those are the types of restrictions imposed here. AETN confined the debate to the purpose for which it was created — to carry candidates who, in the professional judgment of AETN's staff, were newsworthy to the viewing audience. Further, Ms. Howarth and her staff made their decision based solely on their informed, good faith editorial judgment. Their decision was not influenced by political pressure, by Mr. Forbes' viewpoint, or by any desire to promote the other candidates. (App. 22a-23a; J.A. 151-52) In short, their decision was narrowly tailored to the state's legitimate, compelling interest to provide valuable programming based on the editorial judgments of its employees.

10/ *See supra* pp. 22-23.

III. THE FIRST AMENDMENT PROTECTS AETN'S EDITORIAL PROCESS.

AETN's broadcast of the debate without Mr. Forbes meets the First Amendment's standards on grounds that are an alternative to forum doctrine: that the State of Arkansas and AETC established AETN as an institution of the free press, so that AETN's editorial decisions are protected under the First Amendment.[11/]

A. AETN's Journalistic Decision-Making Is Separated from the Political and Administrative Influences of the State.

The statute establishing AETC, and authorizing it to create and operate AETN, reflects a compelling governmental purpose. It is to bring the benefits of what is today known as public television to the residents of Arkansas. ARK. CODE ANN. § 6-3-105(a) (App. 50a). This statute is Arkansas' response to what emerged as a national consensus in the 1960s: that the nation would be well served by funding a system of public television and radio so that noncommercial educational programming would become available to almost the entire population of this country. *See generally* JAMES B. CONANT ET AL., THE REPORT OF THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION, A PROGRAM FOR ACTION (1967) ("CARNEGIE I"); WILLIAM J. MCGILL ET AL., THE LANDMARK REPORT OF THE CARNEGIE COMMISSION

11/ *See* William Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974) (arguing for First Amendment protection of public broadcasters' editorial function), *cited in League of Women Voters*, 468 U.S. at 392 n.21.

ON THE FUTURE OF PUBLIC BROADCASTING, A PUBLIC TRUST (1979). At the time CARNEGIE I was published, there were no public television stations in Arkansas. *Id.* at 107-109.

When the Arkansas legislature set out to establish a public television network in Arkansas, it created what is now AETC, and charged it with the duty of using channels that the FCC had reserved for noncommercial television. ARK. CODE ANN. § 6-3-105(c) (App. 50a). In consequence, AETC as licensee must meet all the requirements to hold a license under the Communications Act.

To that end, AETC adopted the *Programming Policy Statement* (App. 96a) and the *Principles of Editorial Integrity* (App. 64a). The *Principles of Editorial Integrity* explain that they were crafted to deal with problems created under the First Amendment by the issuance of broadcast licenses to governmental entities:

> [I]t was an irony that in a nation where government broadcasting had not only been rejected but was anathema, government was now holding broadcast licenses. And it was to be a source of problems.

(App. 90a)

The *Principles of Editorial Integrity* were developed as a structural solution to the First Amendment conundrum in which AETN, like other state-owned broadcasters, found itself. (App. 90a) AETN adopted the *Principles of Editorial Integrity* to insulate its editorial processes from political pressure. AETC delegated its licensee programming responsibility to its Executive Director, pledging in the *Programming Policy Statement* (which governs all AETN's operations) to protect the Executive Director from political and other undue influence in

the exercise of her programming judgment. The Executive Director became the editor-in-chief of AETN. (J.A. 108) She is responsible for following general policy guidance in making (or delegating and supervising) editorial decisions, and can be dismissed for failure to follow those policies.[12/] However, under the *Programming Policy Statement* and the *Principles of Editorial Integrity*, even AETC's commissioners are not privileged to second-guess her editorial judgments case-by-case.[13/]

12/ However, even if some or all of AETC's commissioners disagree with her news judgment in a particular instance, they cannot dismiss the Executive Director for making editorial judgments that follow the *Programming Policy Statement* and the *Principles of Editorial Integrity*. *See Gladden v. Arkansas Children's Hosp.*, 728 S.W.2d 501, 505 (Ark. 1987) (employer may not discharge employee in violation of express provision in employment manual); *see generally* Canby, *supra* note 11, 52 TEX. L. REV. at 1138-43, 1159-60; *Cf. Bazaar v. Fortune*, 476 F.2d 570, 574-75 (5th Cir.) (under First Amendment, state university could not censor student literary magazine), *aff'd as modified en banc*, 489 F.2d 225 (1973), *cert. denied*, 416 U.S. 995 (1974); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) (state college could not, by withholding funds or otherwise, control editorial content of campus newspaper) ("[T]he creation of the form does not give birth also to the power to mold its substance.").

13/ Other states take different approaches to reach the same result of insulating the professional staff's editorial decisions from the state. In Iowa, for example, the legislature established Iowa Public Television as an institution of the press, independent of state political or administrative control. IOWA CODE §§ 256.80, 256.90 (West 1997). Further, the Iowa statute

The protections established by AETC were effective. The jury found that AETN's decision to exclude Mr. Forbes from the debate was not subject to any political pressure (App. 22a), and the evidence amply supports that finding. Mr. Forbes admitted that he knew of no political pressure or other irregularity in AETN's editorial process. (J.A. 102-03) Both Ms. Howarth and Ms. Oliver testified that they received no political pressure about their decision not to invite Mr. Forbes. (J.A. 124-25, 147)

B. Under This Court's Decisions, AETN's Judgments about Newsworthiness Are Shielded by the First Amendment from Second-Guessing by Members of the Public.

This Court recognizes that "broadcasters are engaged in a vital and independent form of communicative activity." *League of Women Voters*, 468 U.S. at 378. For that reason, "the broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties].'" *CBS v. FCC*, 453 U.S. at 395 (quoting *CBS v. DNC*, 412 U.S. at 110). Further, "if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon

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creates an Advisory Committee on Journalistic and Editorial Integrity, and specifically states that IPTV is to be governed by the *Principles of Editorial Integrity*. *See Marcus*, 24 Med. L. Rptr. at 2533, 97 F.3d at 1142.

Oklahoma makes it a misdemeanor for any elected official or his representative to influence the content of any public television program. *Principles of Editorial Integrity* (App. 93a); OKLA. STAT. ANN. tit. 70 § 23-102 (West 1996).

the editorial initiative and judgment of the broadcasters who bear the public trust." *League of Women Voters*, 468 U.S. at 378. That reasoning applies to commercial and public broadcasters alike. *See Community-Serv. Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (*en banc*) ("noncommercial licensees are fully protected by the First Amendment").

It should not matter that AETN — like most public broadcasters — is owned by the state. AETN's mission is to provide programming that serves the public interest the Court enunciated in *CBS v. FCC* and *League of Women Voters* to provide balanced and diverse programming. (*Programming Policy Statement*, App. 97a-99a). The structural protections for AETC are a state-level complement to "the elaborate structure established by the Public Broadcasting Act [that] already operates to insulate local stations from governmental interference." *League of Women Voters*, 468 U.S. at 388-89. This legislative scheme, plus "the character of public broadcasting," were fundamental to the Court's conclusion in that case that public broadcasting was protected from "governmental coercion and interference" at the federal level. *Id.* at 388, 389. The same is true here at the state level.

The Court also recognized in *League of Women Voters* that at least two-thirds of public television stations were licensed to state entities; but the Court refrained from deciding whether a content prohibition directed only at publicly-owned licensees would violate the First Amendment. *Id.* at 394 nn. 22, 24. This case now raises the closely related issue of whether a state, by adopting and following the *Programming Policy Statement* and the *Principles of Editorial Integrity*, can establish a public broadcasting network as an institution of the press. If so, then Ms. Howarth's editorial decisions are as entitled to the protections of the First Amendment as are the decisions of the

private broadcast press. Those protections are broader than the rules applicable to a nonpublic forum.

When a state employee's professional and ethical obligations "require [her] to act in a role independent of and in opposition to the State," she is not deemed a state actor for constitutional purposes. *West v. Atkins*, 487 U.S. 42, 50 (1988). Therefore, the consequence of AETC's policies and practices is that Ms. Howarth, as AETN's editor-in-chief (J.A. 108), fills the classic fourth-estate role of the press as independent from, and an *adversary* to, the state.[14/] Her *editorial* decisions are, in essential nature, a private press function. Her role as editor is comparable to that of the public defender in *Polk County v. Dodson*, 454 U.S. 312 (1981), who was held not to be acting "under color of state law in exercising her independent professional judgment in a criminal proceeding." *Id.* at 324. "It is the independence from governmental control as to how the assigned task is to be performed that is crucial." *Id.* at 327

14/ The role of the press as adversary to the state has a long legal history in this country, dating at least from the trial of Peter Zenger and including the Sedition Act of 1798, 1 Stat. 596. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273-77 (1964); *id.* at 270, ("[D]ebate on public issues should be uninhibited, robust, and wide open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("[T]he Government's power to censor the press was abolished [by the Founding Fathers] so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people."); *see also, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

(Burger, C.J., concurring). *Compare West v. Atkins* (private physician under contract part-time to state prison hospital system to provide medical care to inmates is in cooperative relationship to state in performing that function, and so operates under color of state law). To determine whether an employee's actions "can fairly be attributed to the State," the Court looks to the employee's "function within the state system, not the precise terms of [her] employment." 487 U.S. at 55. (Like the public defender who may act under color of state law when performing administrative functions, *Polk County*, 454 U.S. at 325, Ms. Howarth's *non-editorial* administrative acts at AETN are performed under color of state law.)

The Court also recognizes that some state-owned property used for expressive activities serves such a special purpose that it is entitled to First Amendment protection. A state-owned university is devoted to the expression of ideas, and its ability to accomplish that mission would be undermined if the teachers employed by the state, speaking on state-owned property, were compelled to give access to members of the public with differing viewpoints.[15/] The Court recognized the special nature of a university in *Widmar v. Vincent*, 454 U.S. 263, 276 (Powell, J.), 279 n.2 (1981) (Stevens, J., concurring); *see also Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Wieman v. Updegraff*, 344 U.S. 183, 194-98 (1952) (Frankfurther, J., concurring). Public broadcasting

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15/ Although the guarantees of free speech apply to school property, "this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs." *Perry Educ. Ass'n*, 460 U.S. at 44.

serves a comparable societal function. Just as a state university must "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study," *Widmar*, 454 U.S. at 276 (quoting *Sweezy*, 354 U.S. at 263), so must a public broadcaster, established *and treated* by the state as an institution of the press, determine for itself the programming it will air.

This conclusion affirms that the role of the press cannot be fulfilled if it is without the protections of the First Amendment. Public broadcasters like AETN (or Iowa Public Television in *Marcus*) cannot afford to litigate the basis of their journalistic judgments whenever candidates or interest groups are displeased enough to file a lawsuit. If a state-entity public broadcaster can be haled into court to prove that any one of its editorial decisions is narrowly tailored to meet a compelling governmental interest, the burden in time and cost will be crushing. State-entity public broadcasters cannot carry out their mission under such a regime.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Eighth Circuit in *Forbes II* should be reversed, and the case remanded with instructions to enter judgment for defendants.

Respectfully submitted,

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